No. 98-1191

In the

Supreme Court of the United States

October Term, 1998

MICHELE PENRY and DEBRA ANN GILLUM,

Petitioners,

-v-

FEDERAL HOME LOAN BANK OF TOPEKA, and its representatives; CHARLES R. WAGGONER, in his capacity as defendants' representative and in his individual capacity,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE[1]

Petitioners filed this suit alleging hostile work environment and retaliation. Gillum also alleged constructive discharge. Neither alleged quid pro quo sexual harassment.[2]

Gillum and Penry were employed as collateral review assistants with FHLB beginning in 1989. Gillum resigned in 1993. Penry transferred to another department in 1994, and is still employed with FHLB. Initially, Waggoner, the collateral review manager, was not Petitioners' supervisor, except during out of town bank inspections. Petitioners were assigned by their supervisor to accompany Waggoner on out of town trips. In the Fall of 1992, Waggoner became Petitioners' supervisor. Aplee. App.\Penry 94 (110-111) (115), 97 (127-132), 110 (208), 119 (292-293), 145 (595-596), 157

[1] In the "Statement of the Case" section of the Petition, allegations of fact are made without citation to the record. Instead of setting forth all facts in the "Statement of the Case," reference is made in the Petition to a "Chart of Incidents" contained in the appendix to the Petition. The "Statement of the Case" section of the Petition, and the "Chart of Incidents" contain statements that are inaccurate, misleading or unsupported by the record. Respondents are compelled to correct Petitioners' misstatements of the record contained in the Statement of the Case pursuant to Rule 15.2 of the Supreme Court Rules, but cannot respond to all of the alleged facts contained in the chart while still complying with Rules 24 and 33(g)(ii) of the Supreme Court regarding format and page limitations. However, the facts were thoroughly addressed in Respondents' briefs filed in the Tenth Circuit Court of Appeals. The following numbered paragraphs in the Petition's Chart of Incidents contain statements that are either unsupported by the record, misleading or inaccurate: #2, 3, 5, 6, 7, 11, 14, 16, 17, 18, 20, 24, 26, 28, 29, 32, 33, 35, 36, 37, 38, 39, 40, 41, 42, 46, 47, 49, and 51.

[2] All references to the parties will be abbreviated as follows: Michele Penry ("Petitioner" or "Penry"); Debra Ann Gillum ("Petitioner" or "Gillum") (collectively "Petitioners"); Federal Home Loan Bank of Topeka and its representatives ("Respondent" or "FHLB"); Charles R. Waggoner, in his capacity as defendants' representative and in his individual capacity ("Respondent" or Waggoner") (collectively "Respondents").

(22-24), 158 (25-26); Aplee. App. Gillum 38 (169), 102 (407), 134 (21), 93 (35).[3]

Petitioners present a long list of complaints regarding conduct and comments by Waggoner between 1989 and 1993, the vast majority of which was determined by both the district court and the Tenth Circuit Court of Appeals to be conduct that was not gender-based, such as pranks (e.g., Waggoner taking his hands off the steering wheel while driving, knocking on Penry's hotel door and then hiding, startling Penry).

The court of appeals found that Waggoner made four gender-based comments to Penry and that none of his conduct involving touching Penry constituted sexually offensive touching. The touching incidents involved pranks. Pet. App. 43a and 48a. The four alleged comments found to be gender-based were: (1) in March 1990, Waggoner asked Penry whether women have wet dreams; (2) in October 1990, Waggoner told Penry that her bra strap was showing, but that he kind of liked it; (3) in March 1991, Gillum overheard Waggoner in another cubicle remark to a co-worker that he could get into the drawers of another female worker, possibly referring to Penry, and Gillum told Penry about it; and (4) in the fall of 1992, before Waggoner became Penry's supervisor, he asked her what she was wearing under her dress. Pet. App. 6a-7a; 46a-47a.[4]

[3] "Aplee App. Gillum" refers to the appendix to the brief filed by Respondents in the Tenth Circuit Court of Appeals in Gillum's appeal; "Aplee. App. Penry" refers to the appendix to the brief filed by Respondents in the Tenth Circuit Court of Appeals in Penry's appeal; "Aplt. App. Gillum" refers to the appendix to the brief filed by Gillum in the Tenth Circuit Court of Appeals; "Aplt. App. Penry" refers to the appendix to the brief filed by Penry in the Tenth Circuit Court of Appeals. Where the cite is to a condensed deposition, the relevant deposition pages will be in parenthesis.

As to Gillum, the court of appeals found that Waggoner made one gender-based comment and engaged in four acts of unwanted physical contact, in addition to other touching that allegedly occurred periodically. Pet. App. 6a-7a; 25a-26a. The gender-based comment was in March 1991, when Gillum claims she overheard Waggoner make a comment about getting into an assistant's drawers. The four incidents of touching include the following: (1) in January 1991, when Gillum and Waggoner were working together she asked him a question about a document and when he came over to view it he leaned against her; (2) in December 1992, while looking over Gillum's shoulder at her work, Waggoner's body touched her, and she thought his breathing indicated sexual arousal; (3) in March 1993, Waggoner came into a file room and brushed against Gillum as he squeezed past her while she stood in front of an open file drawer; and (4) in May 1993, Waggoner squeezed himself between Gillum and her computer so that he was able to look down her shirt and she felt his pelvis touch her shoulder. She also claims that periodically, when she would hand him paper, he would touch her arms or hands with his arms, though she offered no evidence to show that the contact was anything other than inadvertent. Gillum acknowledges that Waggoner never asked for sex or even for a date. Aplt. App. Gillum 74 (239-40).

The Tenth Circuit agreed with the district court's analysis as to what conduct was gender-based, but disagreed slightly with it's approach in which all conduct that was not gender-based was considered to be irrelevant to Petitioners' claims. The Tenth Circuit held that the existence of sexual harassment must be determined "in light of the record as whole" and that an examination must be made of the totality of the circumstances, including "the context in which the

[4] "Pet. App." refers to the appendix filed with the Petition.

alleged incidents occurred." After a review of the record as a whole, the Tenth Circuit found that at least two of the incidents that the district court found were not gender-based were nevertheless relevant to the Petitioners' claims of hostile work environment. Those two incidents were: (1) Waggoner pointed out to Penry in the fall of 1991 and to Gillum in 1990, that the roof of a mall was shaped like a woman's breasts; and (2) Waggoner took Gillum to Hooters restaurant while on a business trip. Even though the Tenth Circuit found that these incidents were not "because of" Petitioners' gender, the acts had gender-related implications which could be considered when evaluating whether ambiguous conduct was in fact gender-motivated or whether gender-motivated conduct was so severe or pervasive as to create Title VII liability. After examining the evidence of gender-based conduct in light of the roof comment and the dinner at Hooters, the Tenth Circuit was unable to conclude that a rational jury could find that Petitioners were subjected to a hostile work environment. Pet. App. 7a-10a.

The Tenth Circuit found that the vast majority of conduct of which Petitioners complained was motivated by poor taste and a lack of professionalism rather than by Petitioners' gender, and that what made the Petitioners' environment hostile, if anything, was not gender-based incidents, but gender-neutral antics which could not be the basis of a Title VII action. The Tenth Circuit found that the gender-based incidents, which were spread over more than three years, were not so severe or pervasive to alter the conditions of the Petitioners' employment and create an abusive work environment. Pet. App. 10a

The statement in the petition that Petitioners' repeated complaints were not addressed by management until the

spring of 1993 and that management endorsed Waggoner's conduct by failing to act, is inaccurate. The earliest complaint to FHLB about Waggoner was in January 1992, by Penry, who requested anonymity. She was given literature on sexual harassment and advised to report any further offensive conduct. An immediate investigation was conducted to determine whether any other staff had similar complaints, but they did not. Aplee App.\Penry 31-32 (75-83), 34-35 (98, 108), 36 (110-113), 37 (119-120), 146 (599-600).

The next time a complaint was made to management about Waggoner was in February 1993. Aplee. App.\Penry 34 (97-98), 46-47 (41-45). Management immediately responded with an investigation, counseling of Waggoner and training seminars for management on sexual harassment. Aplee. App.\Penry 45 933-36), 46 (37-38, 40-42), 47 (43-45), 48 (54), 49 (58), 60 (237), 74 (149-51), 76 (197-99), 77 (212), 261.

After Petitioners again complained in April 1993, a thorough investigation was conducted. Aplee. App. Penry 52-53 (83-85), 172-80 (77-78, 80-95, 106-12), 184 (193), 185-87 (364, 375-77, 380-81), 189 (420-22), 257-63.

The statement in the petition that Waggoner's conduct escalated is inaccurate and not supported by citation to the record. As a part of management's response to Petitioners' complaints in April, 1993, a departmental meeting was called. Afterwards, Waggoner called Petitioners into his office and apologized for some of his prior statements and attempted to reassure them by telling them that he had worked with women for thirty years, he enjoyed their friendship and the only time he had fired women in the past had been for performance reasons. Petitioners doubted his sincerity and

interpreted his statement as a threat to retaliate against them by firing them if they again complained about him. They reported this to Waggoner's supervisor who assured them they could continue to bring their complaints to him and immediately admonished Waggoner, downgraded him on his evaluation and included this incident in a counseling statement issued to Waggoner. Aplee. App.\Penry 54 (93-94), 152-3 (679-80, 683-85), 167 (205-06), 178-79 (113-15), 180 (124-26), 181, 188 (407-09), 307-10, 392-93. No adverse employment actions were ever taken against Petitioners. Though it is claimed that Waggoner searched Petitioners' office files in retaliation for their complaints, there is no evidence in the record to support the allegation that the review of the records was for any purpose other than to carry out his job duties and this was not included in the Petitioners' pretrial questionnaire. Aplee. App.\Penry 383-91.

Petitioners state that much of Waggoner's behavior at the office was publicly humiliating. Petition, p. 11. Yet Petitioners make no citations to the record to support this statement, nor is it true. Petitioners also state that Waggoner made sexual comments when "he had control over the women alone and out of town." Petition, p. 11. Other than counsel's statements to this effect, there is no evidence in the record to support the statement that Waggoner had control over the women. Aplee. App.\Penry 97-98 (127-133). The statement in the petition that Waggoner knew that Gillum had been sexually abused as a child is inaccurate and not supported by the record. Aplee. App.\Gillum 131 (592-595). The statement that Penry was pregnant when much of Waggoner's touching and screaming occurred is misleading. The only incidents of "touching" involved pranks where Waggoner would startle Penry by touching her shoulders and saying her name when she didn't expect it. There is no evidence

that Waggoner's conduct was motivated by Penry's pregnancy.

FHLB had a policy against sexual harassment that was contained in the employee handbook and supervisors' manuals. Employees were encouraged to report sexual harassment and FHLB had a formal grievance procedure that allowed employees to bypass their supervisors and also provided that in sex discrimination cases the employees could forgo the formal grievance procedure and ask the human resources manager to handle the complaint directly. Aplee. App.\Penry 70-71 (80-81, 92-94), 114 (252), 320-322, 334.

REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI

I.

THIS CASE DOES NOT INVOLVE A DECISION BY THE COURT OF APPEALS THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT BECAUSE THE COURT OF APPEALS PROPERLY CONSIDERED THE TOTALITY OF THE SURROUNDING CIRCUMSTANCES WHEN IT DETERMINED THE EXISTENCE OF SEXUAL HARASSMENT

One of the primary purposes of certiorari jurisdiction is to afford review where a court of appeals has decided an important question of federal law in a way that conflicts with relevant decisions of this Court. This purpose is expressed in Rule 10 of the Supreme Court Rules which provides in pertinent part as follows:

> Review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> (c) a ...United States court of appeals...has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Petitioners assert that the decision of the Tenth Circuit Court of Appeals in this case is "directly contrary" to this Court's rulings regarding the proper analysis to apply to sexual harassment claims. Petitioners contend that while the court of appeals articulated the need to consider the "totality of the circumstances" when evaluating sexual harassment claims, it did not actually apply this in its analysis, but instead limited its consideration to conduct it considered to be gender-based and conduct with gender-related implications.

Contrary to Petitioners' assertions, the Tenth Circuit quoted and adhered to this Court's relevant decisions regarding the examination of the totality of the circumstance when determining the existence of sexual harassment. The court of appeals and Petitioners are in agreement as to the rule that a court should consider "the record as a whole" and the totality of circumstances, "including the context in which the alleged incidents occurred," in determining the existence of sexual harassment, but disagree as to its proper application to the facts of this case. *Meritor Savings Bank v. Vinson*, 106 S. Ct. 2399 (1986) (quoting EEOC guidelines, 29 C.F.R.

§1604.11(b) (1985)). Petitioners interpret the rule as requiring the court of appeals to base liability on all conduct considered objectionable by Petitioners, regardless of whether the conduct was gender-based or had gender-related implications. The court of appeals did not agree. Instead, the court of appeals looked at all evidence of the Petitioners' general work environment and found that the vast majority of the conduct of which Petitioners complained amounted to gender-neutral antics motivated by poor taste and a lack of professionalism rather than gender, and so were irrelevant to a determination of whether there existed an actionable hostile work environment. But the court eschewed a mechanical approach in which all conduct that was not gender-based was deemed irrelevant, and instead, found that two incidents that were not gender-based were nevertheless relevant to Petitioners' claims of a hostile work environment because they had gender implications. The Court held that "[e]ven where the motive behind the alleged conduct was not the plaintiff's gender, the court may still consider that conduct relevant when evaluating whether ambiguous conduct was in fact gender-motivated or whether gender-motivated conduct was so severe and pervasive as to create Title VII liability." Pet. App. 10a.

This holding by the court of appeals in no way conflicts with the three decisions of this Court cited by Petitioners. Petitioners cite *Oncale v. Sundowner Offshore Services, Inc.*, 118 S.Ct. 998, 1003 (1998); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22-23 (1993); and *Meritor* as holding that in order to properly evaluate conduct claimed to constitute sexual harassment, a court must view the conduct in question in the context in which it occurred. As this Court noted in *Oncale*, a football player's environment is not severely or pervasively abusive where a coach smacks him on the buttocks as he

leaves the field, though the same conduct would be if directed at the coach's secretary back at the office. *Oncale v. Sundowner Offshore Services, Inc.*, 118 S.Ct. at 1003. There is nothing in the Tenth Circuit decision that suggests any deviation from this principle. The Tenth Circuit cited several cases, including *Meritor*, as requiring a trier of fact to examine the totality of the circumstances, including the context in which the alleged incidents occurred, in determining the existence of sexual harassment. Pet. App. 7a-8a.

The real dispute in this case is not whether a trier of fact must consider the totality of circumstances in determining whether conduct constitutes sexual harassment, but how the rule should have been applied to the facts of this case. Petitioners contend, in essence, that the context in which much of Waggoner's conduct occurred should have convinced the court of appeals that the conduct was motivated by discriminatory intent. The Tenth Circuit simply did not agree and instead found that the vast majority of the conduct in question was motivated by poor taste and a lack of professionalism rather than Petitioners' gender. In so holding, the court of appeals cited an earlier decision in which they held: "If the nature of an employee's environment, however unpleasant, is not due to her gender, she has not been the victim of sex discrimination as a result of that environment." Pet. App. 11a.

Rule 10 of this Court's Rules provides as follows:

> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Certiorari review should be denied in this case because the essence of Petitioners' claim of error is that the court of appeals properly stated the rule of law, but misapplied it to the facts.

II.

THE RULING BY THE COURT OF APPEALS DID NOT DECIDE AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT REGARDING THE SUFFICIENCY OF ABUSIVE CONDUCT TO ESTABLISH A SEXUAL HARASSMENT CLAIM

Petitioners' second argument is that the decision below conflicts with this Court's precedent in *Faragher v. City of Boca Raton*, 118 S. Ct. 2275 (1998) and *Oncale* because it imposes different "guidelines" for determining the sufficiency of abusive conduct in establishing a sexual harassment claim.

Petitioners fail to identify the asserted conflict between the guidelines followed by the court of appeals in the decision below and this Court's guidelines for determining the existence of sexual harassment in *Faragher* and *Oncale* and no such conflict exists. The guidelines applied by the court of appeals below were the guidelines established by this Court.

The Tenth Circuit held that a plaintiff must show that the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment. The court further held that a

plaintiff must produce evidence that she was the object of harassment because of her gender and that conduct that is overtly sexual may be presumed to be because of the victim's gender, though actionable conduct is not limited to behavior motivated by sexual desire. In addition, the court of appeals held that while the plaintiff must make a showing that the environment was both objectively and subjectively hostile, she need not demonstrate psychological harm, nor is she required to show that her work suffered as a result of the harassment. Pet. App. 5a-6a. Thus, the guidelines articulated by the court of appeals were simply a restatement of the precedents established by this Court, primarily in *Harris*, *Meritor* and *Oncale*.

Petitioners also contend that the facts of this case are far more egregious than those in *Faragher* and *Oncale*, so that to allow the opinion to stand would be to establish a threshold of proof far more onerous than was established in those cases. First, the abusive, gender-based conduct in *Faragher* and *Oncale* was far more severe and pervasive than those asserted by Petitioners. While *Faragher* involved repeated overt sexual touching and groping of female employees' bodies, requests for sexual favors and a vulgar pantomime of oral sex, and *Oncale*, involved several occasions when Oncale was forcibly subjected to sex-related, humiliating acts in the presence of others and physically assaulted and threatened with rape, nothing remotely approaching such conduct was established by Petitioners. Second, because the decision of the court of appeals below did not contravene any guidelines or standards of actionable conduct established by this Court, the petition for a writ of certiorari should be denied. Supreme Court Rule 10 provides that "[a] petition for a writ of certiorari will be granted only for compelling reasons" and is "rarely granted" when the claimed error is the "misapplication of a properly stated rule of law."

Accordingly, Petitioners have failed to demonstrate that the court of appeals has decided this case on an important federal question in a way that conflicts with relevant decisions of this Court. As a result, the petition should be denied.

III.

THIS COURT SHOULD NOT GRANT REVIEW OF PETITIONERS' CLAIM THAT FHLB CREATED A HOSTILE WORK ENVIRONMENT THROUGH THREATS AND INACTION BECAUSE THE COURT OF APPEALS DID NOT DECIDE THE ISSUE IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT

Petitioners' third argument is that FHLB created a hostile work environment through the threats and failures of its officers to act following Petitioners' complaints of sexual harassment by Waggoner. This argument is essentially the same as the Petitioners' first and second arguments. Petitioners do not identify a rule of law that was incorrectly decided by the court of appeals in the decision below, nor do they assert or identify how the decision conflicts with relevant decisions of this Court or any other court of appeals. Instead, Petitioners simply re-argue facts and conclude that the court of appeals misapplied a properly stated rule of law to the facts. The Tenth Circuit properly stated the law in holding that to survive summary judgment, a plaintiff must show that the workplace is permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the terms and conditions of the victim's employment and create an abusive working environment. Pet. App. 5a-6a; *Harris v. Forklift Systems, Inc.*, 510 U.S. at 21.

Under Rule 10 of the Supreme Court Rules, "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Consequently, the Court should deny the petition.

IV.

THE COURT SHOULD NOT GRANT REVIEW OF THE DECISION OF THE COURT OF APPEALS REGARDING RETALIATION BECAUSE THE ASSERTED ERROR CONSISTS OF ERRONEOUS FACTUAL FINDINGS OR THE MISAPPLICATION OF A PROPERLY STATED RULE OF LAW

Petitioners' fourth argument is that a writ of certiorari should be granted because in ruling on the retaliation claim the court of appeals misapplied an otherwise properly stated rule requiring adverse employment action to the facts of this case. Yet Rule 10 of the Supreme Court Rules states that certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

The court of appeals below held that to establish a prima facie case of retaliation under Title VII, the plaintiff must show the court that:

> (1) she engaged in protected opposition to Title VII discrimination ....; (2) she suffered an adverse employment action contemporaneous with or subsequent to such opposition or participation; and (3) there is a

> causal connection between the protected activity and the adverse employment action.

Pet. App. 11a. After a thorough review of the record, the court of appeals agreed with the district court's conclusion that a prima facie case of retaliation had not been made because "the record fails to demonstrate that either of the plaintiffs suffered adverse employment action ...." App. 11a.

None of the cases cited by Petitioners conflict with the rule articulated by the court of appeals requiring adverse employment action to establish a prima facie case of retaliation. Nor do any of the cases cited by Petitioners reach a contrary result under similar factual circumstances. Petitioners claim that Respondents should have been held liable for retaliation because the Petitioners perceived a job threat from Waggoner after reporting their complaints, even though there is no evidence that Waggoner had authority to fire employees. Waggoner's superior immediately assured Petitioners that no retaliation would occur and encouraged them to report to him all complaints they had in the future, warned Waggoner not to retaliate, and no adverse action of any kind was ever taken against Petitioners.

Petitioners cite *Robinson v. Shell Oil Co.*, 117 S. Ct. 843 (1997), but that case involved the question of whether the anti-retaliation provisions of Title VII apply to former employees, and does not address the question of whether a perceived threat by a supervisor is actionable regardless of whether the perceived threat is immediately countermanded by the supervisor's superior and no adverse employment action is taken.

Petitioners also cite *Hashimoto v. Dalton*, 118 F.3d 671, 675 (9th Cir. 1997), but that case is distinguishable. In *Hashimoto*, the employer was found to have engaged in adverse employment action against a former employee who had filed an EEOC complaint when the employer disseminated a negative job reference to a prospective employer in retaliation for filing a complaint. Here, on the other hand, no adverse employment action was taken.

The third case cited by Petitioners is *EEOC v. L.B. Foster Co.*, 123 F.3d 746 (3rd Cir. 1997). This case also fails to support Petitioners' contention because in *L.B. Foster Co.*, the court of appeals held that the plaintiff had made out a prima facie case of retaliation because she had shown that following her threat to file a complaint, her former employer had taken adverse employment action against her by refusing to give her a job reference when such references were routinely given. No such adverse employment action exists here.

Petitioners also contend that the decision of the court of appeals below conflicts with three of its previous decisions. In the first case, *Berry v. Stevinson Chevrolet*, 74 F.3d 980, (10th Cir. 1996), the employer engaged in actual retaliatory action by filing criminal charges against a former complaining employee. In the second case, *Rutherford v. American Bank of Commerce*, 565 F.2d 1162 (10th Cir. 1977), the employer retaliated with an unflattering job reference. In *Love v. RE/MAX of America, Inc.*, 738 F.2d 383 (10th Cir. 1984), the court of appeals recognized termination as adverse employment action. These three cases differ from the decision below where no adverse employment action was taken against the Petitioners at any time. Moreover, under Rule 10 of the Supreme Court, conflicting decisions from the same

court of appeals is not one of the circumstances for which certiorari is generally granted.

V.

REVIEW SHOULD NOT BE GRANTED AS TO CLAIM OF INTENTIONAL INFLICTION OF EMOTIONAL HARM BECAUSE THE COURT OF APPEALS DID NOT DECIDE AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH A DECISION BY A STATE COURT OF LAST RESORT

Petitioners' fifth argument in support of their petition is that the court of appeals did not correctly apply to the facts the legal standard established by the Kansas Supreme Court regarding intentional infliction of emotional harm. However, this is not generally the circumstances under which this Court grants a petition for a writ of certiorari. In describing the character of the reasons this Court considers in granting review on a writ of certiorari, Rule 10 of this Court's rules, further provides in pertinent part :

> (a) a United States court of appeals ... has decided an important federal question in a way that conflicts with a decision by a state court of last resort..."

Petitioners fail to assert the existence of an important federal question presented by the ruling on the claim of intentional infliction of emotional harm, and none exits. A common law question of intentional infliction of emotional harm does not involve an important federal claim.

Moreover, the court of appeals in the decision below quoted and relied upon the legal standards for such claims established by the Kansas Supreme Court in *Lindemuth v. Goodyear Tire & Rubber Co.*, 19 Kan. App. 2d 95, 864 P.2d 744, 749 (Kan. 1993) and *Moore v. State Bank*, 240 Kan. 382, 729 P.2d 1205, 1211 (Kan. 1986), and Petitioners do not assert to the contrary. Pet. App. 12a - 13a. Therefore, the Court should deny the petition regarding this asserted error.

VI.

IN GRANTING RESPONDENTS' BILL OF COSTS, THE TENTH CIRCUIT DID NOT DECIDE AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT OR WITH DECISIONS OF ANOTHER COURT OF APPEALS

Petitioners' last argument is that the petition should be granted to permit review of the decision granting Respondents' bill of costs awarded pursuant to Fed. R. App. P. 39.

Petitioners cite no relevant, conflicting decisions of this Court or of another court of appeals. Instead, Petitioners cite *Tukadinovisch v. McCarthy*, 59 F. 3d 58 (C.A. 7, Ind. 1995), which is a case permitting a defendant to be reimbursed for attorney fees incurred in seeking to collect an award of costs and attorney fees under 42 U.S.C. §1988, as opposed to Fed. R. App. P. 39, which was the basis for the decision of the court of appeals below. Unlike an award of costs and fees under 42 U.S.C. §1988, where awards to prevailing defendants are generally limited to frivolous claims or appeals, (*Id.* at 61.), under Fed. R. App. P. 39 costs are routinely awarded to an appellee where the judgment is affirmed.

Fed. R. App. P. 39(a)(2) provides that "unless the law provides or the court orders otherwise ... if a judgment is affirmed, costs are taxed against the appellant." Here, judgment was affirmed on appeal. Accordingly, the court of appeals did not decide an important federal question in a way that conflicts with relevant decisions of this Court or with a decision of another United States court of appeals, and as a result, the petition should be denied.

Moreover, Petitioners did not prevail on any claim they asserted and were not awarded any relief. The court of appeals affirmed the district court's entry of summary judgment on all claims.

CONCLUSION

Petitioners have failed to demonstrate that the court of appeals has entered a decision in conflict with the decision of another U. S. court of appeals, in conflict with relevant decisions of this Court or in conflict with a decision of the Kansas Supreme Court on an important federal question. Nor have they established any compelling reason for granting the petition for a writ of certiorari. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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